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In The

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1284 ~~1352~~

SPECTOR FREIGHT SYSTEM, INC. OF ILLINOIS,
Petitioner,

vs.

ROY SCHWARTZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in the above case on December 19, 1975.

OPINION BELOW

The opinion of the Supreme Court of the State of Minnesota is not yet officially reported, but is unofficially reported in 221 NW 2d 665. A copy of the opinion appears in full in the appendix.

JURISDICTION

The judgment of the Supreme Court of the State of Minnesota was finally entered on December 19, 1975. The decision of the Minnesota Supreme Court sought to be reviewed herein was filed on August 2, 1974, but it remanded the case to the lower Court to decide questions of exclusively State law. A petition for rehearing of the Federal questions in the opinion of August 2, 1974 was denied by the Supreme Court of Minnesota on October 2, 1974.

The jurisdiction of this Court is invoked under 28 USC Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Does a "conflict of laws" rule violate the Full Faith and Credit clause of the U. S. Constitution when a Minnesota court, in a negligence action for personal injuries, ignores the law of Indiana and applies a Minnesota statute that is in conflict with Indiana law, where the accident occured on an Indiana tollway between three semi-trailer trucks travelling to various interstate places and owned by corporations from Illinois, Delaware and Minnesota and driven by individuals from Minnesota, Ohio and Indiana?

2. When a plaintiff employee drives his employer's semi-trailer truck into the rear end of defendants' trucks, killing the driver of one truck, can a Minnesota court destroy a vested right to a complete and full defense of contributory negligence, without denying the corporation its right to Due Process of law?

3. In an action for damages based on negligence, can a Minnesota court retroactively apply a Minnesota statute that became effective nearly five years after an accident

occurred without giving effect to a law Ex Post Facto and thereby depriving Petitioner of Due Process of law?

4. Is there a denial of Equal Protection of Petitioner in a negligence action where the Minnesota conflict of laws rule gives differential treatment to a citizen and a foreigner merely on the basis of domicile?

5. Has the State of Minnesota passed a law impairing the obligation of contracts where a contract of insurance is based in its rates and premiums on contributory negligence, and a state retroactively applies a law of comparative negligence to an accident that occurred in 1964 when the comparative negligence statute did not become effective until 1969 so that there was no opportunity to revise the contract to comply with the new law?

CONSTITUTIONAL PROVISIONS

The Constitutional provisions and statutes involved are: the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States, U.S.C.A. Const. Amend. XIV Section 1 which provides as follows:

> Section 1. All persons born or naturalized in the United States, and are subject to the jurisdiciton thereof, are citizens of the United States and of the state wherein they reside. No state shall make or endorce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> U. S. Constitution Article IV Section 1 "Full faith and credit shall be given in each state to the public

Acts, Records, and Judicial Proceedings of every other state . . ."

U. S. Constitution Article I, Section 10 "No state shall . . . pass any . . . law impairing the obligations of Contracts . . ."

The statutes involved are Minnesota Statutes 604.01 which provides as follows:

SUBDIVISION 1. SCOPE OF APPLICATION. Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.

STATEMENT OF THE CASE

Respondent brought an action in Minnesota to recover for personal injuries that he sustained in a three-truck accident that occurred in the State of Indiana allegedly due to the negligence of Petitioner, SPECTOR FREIGHT

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SYSTEM, INC. of Illinois, and CONSOLIDATED FREIGHTWAYS CORPORATION of Delaware. The case arose from a collision involving three semitractor-trailer units which occurred on the Indiana tollway near Elkhart, Indiana. The collision occurred at approximately 5:05 A.M. November 20, 1964, on the westbound side of the Indiana tollway.

The Respondent's vehicle was owned by Northern Co-operative, Inc. of Wadena, Minnesota. Respondent and his co-driver had left Minnesota to deliver commodities to Toledo and Columbus, Ohio. Thereafter, they picked up a load in Barberton, Ohio, and were en route back to Minnesota when the collision occurred. The unit belonging to Respondent's employer is licensed and maintained in Minnesota.

A second vehicle involved in the collision was leased to Petitioner SPECTOR FREIGHT SYSTEM, INC. of Illinois. This unit was owned and operated by an Ohio resident, and the vehicle was maintained and garaged by the deceased driver at his home in Ohio. At the time of the accident, the vehicle was delivering a shipment from Cleveland, Ohio, to Kenosha, Wisconsin.

The third vehicle involved in the collision was owned by CONSOLIDATED FREIGHTWAYS CORPORATION of Delaware, and it was driven by an Indiana resident and co-driven by an Ohio resident. The unit was garaged and maintained in Ohio, but the tractor was licensed in Delaware. Neither the tractor nor the trailer was licensed to operate in Minnesota. At the time of the accident this unit was making a run from Akron, Ohio to Chicago, Illinois, and was to return to Akron.

The Consolidated vehicle had stopped behind a line of traffic in the right-hand lane due to a blocking of the traf-

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fic. The Spector vehicle then approached the stopped Consolidated unit from the rear and came to a stop directly behind the vehicle. Respondent had been following the same route and traveling in the same lane as the Consolidated and Spector vehicles. As he approached the vehicles from the rear at a speed of 45 to 50 miles an hour, he struck the rear of the Spector vehicle forcing it into the Consolidated vehicle.

The action was tried from November 20 1972 to December 1, 1972, to a jury in District Court, Fourth Judicial District, State of Minnesota. By special interrogatories, the jury found that all three drivers were negligent and that their negligence was a direct cause of the accident. They found the Consolidated driver 60% negligent, the Spector driver 30% negligent and the Respondent 10% negligent. The trial court ruled that Indiana law of contributory negligence would apply. Respondent appealed from the court's order on the portion of the judgment applying Indiana law as opposed to the Minnesota comparative negligence that had been passed in 1969 subsequent to the accident but prior to the time of trial. The Supreme Court of Minnesota, Justice Yetka, reversed the trial court and held that Minnesota law applied to the accident. Justice Yetka stated in his opinion with respect to the federal questions involved in applying Minnesota law, "Once jurisdiction attaches, the forum may, subject to the rather minimal due process standards, apply its own choice-of-law rules to determine what law governs the case. *Crider v. Zurich Ins. Co.*, 380 US 39, 85 S. Ct. 769, 13 L. ed. 2d 641 (1965); *Home Insurance Co. v. Dick*, 281 US 397, 50 S. Ct. 338, 74 L. ed. 926 (1930)." The Supreme Court of Minnesota remanded the case to lower court for a determination of whether there was misconduct of Respondent's counsel in his final argu-

ment. This state law question was finally decided on a second appeal filed December 19, 1975. Prior to the determination of the second appeal, Consolidated settled with Respondent and Respondent's workman's compensation carrier for $200,000.00, and the only parties remaining in this case are Petitioner and Respondent. In response to the federal question raised in the opinion of the Supreme Court on August 2, 1974, Petitioner filed a petition for re-hearing, contending that the choice-of-law rule in the opinion violated the Equal Protection clause, Full Faith and Credit clause, Due Process clause, and the Obligation of Contracts clause. The Minnesota Supreme Court declined to consider the specific federal questions raised by their opinion, and denied Petitioner's petition for re-hearing on October 2, 1974. The petition for re-hearing is set out in full in the Appendix.

REASONS FOR GRANTING THE WRIT

The Minnesota Supreme Court in its opinion decided a federal question of substantial importance to each of the United States in the confused area of conflicts of laws. We present to the Court the interesting question of the Constitutional limitations on a state's choice-of-laws rule in a negligence action.

This Court has not considered the general question of the Constitutional limitations on choice-of-laws rules since 1965, with the case of *Crider v. Zurich Ins. Co.*, supra. The *Crider* case, like a substantial number of other cases decided by the U. S. Supreme Court on this question, involved a claim for workman's compensation benefits. Apparently, this Court has never considered the Constitutional limitations to choice-of-laws rules with regard to tort ac-

tions. There are a substantial number of workman's compensation cases, in addition to a number of cases involving the interpretation of insurance policies.

In *Crider*, the Court held that the state where an *employee* resides and is injured may adopt such choice of remedy as it desires in a workman's compensation action. The Minnesota court would interpret this to apply also to actions in negligence outside of the workman's compensation act.

To determine that a state may adopt any choice-of-law rules it desires in a tort action violates the Full Faith and Credit clause, Due Process clause, and Equal Protection clause of the Constitution. Obviously, different considerations apply in an action involving the rights of a defendant in a tort action. In workman's compensation, it is a clear policy of all states to protect injured employees. In a tort action, however, negligence is not presumed against the defendant and must be proved. The state has an equal interest in preserving the property rights of a defendant. Plaintiff and defendant in a tort action stand on equal footing, and the interest of the state is in granting a fair trial to both parties. The interest of the state in a workman's compensation proceeding, on the other hand, is to compensate an injured employee for injuries that arose out of and in the course of his employment. In a tort action, justice for the defendant is equal in importance to compensating a plaintiff for injuries, and a state clearly has no right to sacrifice the interest of a defendant in its rights in order to advance the interest of the plaintiff.

In addition, to apply Minnesota law in this case merely because the plaintiff resides in Minnesota is a violation of the substantive Due Process rights of the petitioner, as stated in *Home Ins. Co. v. Dick*, supra. The only contact

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Minnesota has with the traffic accident in Indiana between the three interstate traveling trucks is the fact that the plaintiff resides in Minnesota. Each of the three trucks was traveling to different interstate points, and happened to converge in Elkhart, Indiana. The Consolidated vehicle had a double bottom trailer, and could not have even been driven legally in the State of Minnesota at the time of the accident. The vehicle of the Petitioner was traveling from Wisconsin to Ohio, and it was garaged and maintained in Ohio; it was leased to SPECTOR FREIGHT SYSTEM, INC. of Illinois, and it had absolutely no contact whatsoever with Minnesota. The only way the plaintiff was able to get personal jurisdiction in a Minnesota court over the Petitioner was because of the fact that Petitioner is a corporation that is licensed to do business in all 50 states.

It would be difficult to conceive of an area of law among the states more in conflict than the conflict of laws rules. Furthermore, this turbulence has occurred since 1963, fairly close in time to the *Crider* decision of this Court in 1965. The traditional rule applied in torts conflict-of-law problems was that the law of the place of injury governed in every case. Many states became disenchanted with this rule of "lex loci delecti". At the present time, twenty-one states and the District of Columbia follow the traditional lex loci rule. These states include:

Arkansas	[*McGinty v. Ballantine Produce, Inc.*, 241 Ark. 533, 408 SW 2d 891 (1966)]
Connecticut	[*Thompson v. EIS Automotive Corp.*, 145 F. Supp. 444 D. Conn. 1950)]
Delaware	[*Bowl-Mor Co., Inc. v. Brunswick Corp.*, — Del. —, 297 A. 2d 61 (1972)]

Georgia	[*Wardell v. Richard Screw Anchor Co.*, 133 Ga. App. 378, 210 SE 2d 854 (1974)]
Indiana	[*Ruckman v. Pinecrest Marina, Inc.*, 367 F. Supp. 25 (D. Ind. 1973)]
Kansas	[*McDaniel v. Sinn.* — Kan. —, 400 P.2d 1018 (Kan. 1965)]
Maryland	[*Frericks v. General Motors Corp.*, 274 Md. 288, 366 A.2d 118 (1975)]
Massachusettes	[*Burke v. Lappin*, — Mass. App. —, 299 NE 2d 729 (1973)]
Michigan	[*Devito v. Blenc*, 47 Mich. App. 524, 209 NW 2d 728 (1973)]
Nevada	[*Wells Fargo & Co. v. Wells Fargo Express Co.*, 358 F. Supp. 1065 (D. Nev. 1973)]
New Mexico	[*Smith v. Greyhound Lines, Inc.*, 382 F. 2d 190 (10th Cir. 1967)]
North Carolina	[*Chewning v. Chewning*, 20 NC App. 283, 201 SE 2d 353 (1973)]
South Carolina	[*Algie v. Algie*, 261 SC 102, 198 SE 2d 529 (1973)]
South Dakota	[*Heidemann v. Rohl*, 86 SD 250, 194 NW 2d 164 (1972)]
Tennessee	[*Telecommunications Engineering Sales & Service Co., Inc. v. Southern Tel. Supply Co.*, 518 F. 2d 392 (6th Cir. 1975)]
Texas	[*Ochoa v. Evans*, 498 SW 2d 380 (Tex. 1973)]
Utah	[*W. W. Clyde & Co. v. Dyress*, 126 F.2d 719 (10th Cir. 1942)]
Vermont	[*Marra v. Bushee*, 447 F. 2d 1282 (2nd Cir. 1971)]
Virginia	[*Kline v. Wheels by Kinney, Inc.*, 464 F.2d 184 (4th Cir. 1972)]
Washington	[*Huddleston v. Angeles Co-op Creamery*, 315 F. Supp. 307 (D. Wash. 1970)]

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West Virginia	[*Ireland v. Britton*, — W. Va. —, 201 SE 2d 109 (1973)]
Dist. of Col.	[*May Dept. Stores Co., Inc. v. Devercelli*, 314 A.2d 767 (1973)]

These states which apply the lex loci rule apply the most conservative application of the Constitutional restrictions against choice of laws rules. Clearly, a court could never depart from Constitutional limitations where it followed the law of the place of injury. The most liberal construction of the Constitutional limitations on choice of laws rules would be that the state of the forum would apply its own law in all cases where there was a conflict of laws. Minnesota has effectively gone to this extent of liberality, and therefore this represents an excellent case for this Court to review the Constitutional problems involved in such a liberal construction of the Constitution's limitations on a state's choice of laws rules.

The New York Court of Appeals was the first court in the United States to depart from the lex loci doctrine, in *Babcock v. Johnson*, 12 NY 2d 473, 191 NE 2d 279, 240 NYS 2d 743 (1963). The court in that case stated that it must look to the jurisdiction with the "most significant contacts" with the parties and with the occurrence. Fifteen states presently follow this "most significant contacts" rule at this time. These are:

Alabama	[*Ideal Structures Corp. v. Levine Huntsville Development Corp.*, 251 F. Supp. 3 (ND Ala. 1966)]
Arizona	[*Moore v. Montes*, 22 Ariz. App. 562, 529 P.2d 716 (1974)]
Colorado	[*Sabell v. Pacific International Express Co.*, — Colo. —, 536 P.2d 1160 (1975)]

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Idaho	[*Shasta Livestock Auction Yard, Inc. v.- Bill Evans Cattle Management Corp.*, 375 F. Supp. 1027 (D. Idaho 1974)]
Illinois	[*Ingersoll v. Klein*, 46 Ill. 2d 42, 262 NE 2d 593 (1970)]
Iowa	[*Zeman v. Canton State Bank*, — Ia. —, 211 NW 2d 346 (1973)]
Kentucky	[*Foster v. Leggett*, 484 SW 2d 827 (Ky. 1972)]
Louisiana	[*Sullivan v. Hardware Mutual Casualty Co.*, — La. —, 278 So. 2d 30 (1973)]
Mississippi	[*Mitchell v. Craft*, — Miss. —, 211 So. 2d 509 (1968)]
Missouri	[*Kennedy v. Dixon*, 439 SW 2d 173 (Mo. En Banc 1969)]
New Jersey	[*Rose v. Port of New York Authority*, 61 NJ 129, 239 A. 2d 371 (1972)]
North Dakota	[*Mager v. Mager*, 197 NW 2d 626 (ND 1972)]
Oklahoma	[*Brickner v. Gooden*, 525 P. 2d 632 (Okla. 1974)]
Oregon	[*Casey v. Manson Construction & Engineering Co.*, 247 Or. 274, 428 P. 2d 898 (1967)]
Pennsylvania	[*Azriel v. Trigitemp Corp.*, 397 F. Supp. 871 (D. Pa. 1975)]

New York, since Babcock, has departed from the "most significant contacts" rule and adopted a "governmental interest analysis" doctrine which allows the forum state greater freedom to apply its own law as opposed to the situs of the tort. This rule is followed in the following six jurisdictions:

California	[*Dixon Mobil Homes, Inc. v. Walters*, 48 Cal. App. 3d 964, 122 Cal. Rptr. 202 (1975)]

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Florida	[*Ganem v. Ganem*, 269 So. 2d 740 (Fla. 1972)]
Maine	[*Beaulieu v. Beaulieu*, — Me. —, 265 A. 2d 610 (1970)]
New York	[*Allstate Ins. Co. v. Sullam*, 76 Misc. 2d 87, 349 NYS 2d 550 (1973)]
Ohio	[*Saalfrank v. O'Daniel*, 390 F. Supp. 45 (D. Ohio 1975)]
Rhode Island	[*Turcotte v. Ford Motor Co.*, 494 F. 2d 173 (1st Cir. 1973)]

Several states are undecided as to the rule which would be applied in a conflict of laws case in their jurisdiction. They are:

Alaska	[*Armstrong v. Armstrong*, 441 P. 2d 699 (Alaska 1968)]
Hawaii	
Montana	[*Lewis v. Reader's Digest Association, Inc.*, 162 Mont. 401, 512 P. 2d 702 (1973)]
Nebraska	
Wyoming	

Three states apply the most liberal rule, and Minnesota represents the most liberal of those three states. These states apply the five "choice influencing considerations" proposed by Professor Robert Leflar in *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. Rev. 267 (1966). In tort cases, Leflar's rule considers the advancement of the forum's governmental interest and the application of the "better rule of law". Wit h the element of "better law", a court is always free to apply the law of the forum. Minnesota [*Myers v. Government Employee's Ins. Co.*,——Minn.——, 225 NW 2d 238 (1974)], New Hampshire [*Gagne v. Berry*, 112 NH 125, 290 A. 2d 624

(1972)], and Wisconsin [*Conklin v. Horner*, 38 Wis. 2d 468, 157 NW 2d 579 (1968)] follow this rule, but Minnesota has gone the furthest in applying the doctrine in such a way to assure application of forum law in every instance.

Because Minnesota represents the most liberal Constitutional construction possible, this Court would be able to make a holding in this case which would add stability to the entire area of conflict of laws without creating any substantial turbulence that would occur by reversing a great number of cases. If this Court is inclined to consider the Constitutional questions in conflicts of laws, it should be in a case that uses the most liberal limits on its discretion.

Furthermore, eradicating Petitioner's defense of contributory negligence in this case denies full faith and credit to the law of Indiana by the Minnesota Court. The question of full faith and credit with respect to conflict of laws rules is considered in Section 591, Constitutional Law, Am. Jur. 2d. It states there that "The test of controlling principle is that the interests of the forum and the other state must be weighed and balanced, with the full faith and credit clause to be given effect except where the interest of the forum is so strongly preponderant over the interest of the other state as not to require the subordination of the forum's laws to the laws of such other state." This Court has stated that it is the final arbiter of the question whether a state may have a local policy meriting recognition as a permissable limitation upon the full faith and credit clause. [*Milwaukee County v. M. E. White Company*, 296 US 268, 80 L. ed. 220, 56 S. Ct. 229 (1939)] In that case the court said, at page 277 U.S., "The very purpose of the Full Faith and Credit clause was to alter the status of the several states as independent foreign sovereign-

ties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation . . ." This full faith and credit question is especially significant to our case where we are denied a defense by ignoring Indiana law. The importance of full faith and credit for a defendant of a civil action is considered in *Bradford Electric Company v. Clapper,* 286 US 145 (1932). There the court stated, at page 160 U.S. "But the company is in a position different from that of the plaintiff who seeks to enforce a cause of action conferred by the laws of another State. The right which it claims should be given effect is set up by way of defense to an asserted liability; and to a defense different considerations apply. Compare *Home Ins. Co. v. Dick,* 281 US 397, 407, 408. A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the p'aintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may ot be done." This court has also supported the position of the above *Bradford* quote in *Hughes v. Fetter,* 341 US 609 where the Court ruled that "A state cannot by simple device of removing jurisdiction from courts otherwise competent, escape Constitutional obligation to enforce rights and duties validly created under laws of other states."

There was no question in many parts of the trial, regarding the traffic laws of the state, that Indiana law would apply. If a state gives some faith and credit to the laws of another state, it must give *full* faith and credit to those laws. This was the position of the Court in *Order of United*

Commercial Travelers of America v. Wolfe, 331 US 586, although that case applied to fraternal organizations.

The Petitioner herein was also denied its rights to Due Process of law by a gross example of retroactive application of law. At the time of the accident in 1964, both Indiana and Minnesota applied the law of contributory negligence. It was at this time that Petitioner entered into a contract of insurance to insure against liability of personal injury actions brought against it for negligence. In 1969, the law in Minnesota was changed to that of comparative negligence. MSA §604.01 Subd. 1.

In applying laws retroactively, courts have been subjected to vague standards as to when retroactive application is Constitutionally permissible. In criminal cases, retroactive application is clearly proscribed by the Ex Post Facto clause in Article I, Section 9 of the U. S. Constitution. Although this Court has not yet held that the Ex Post Facto clause may apply to civil actions, the Court should consider the Due Process questions with respect to retroactive application. This is a matter of concern for the Bar and a number of courts that have considered the question. The conclusion to be drawn from the case law is unclear and should be resolved by this Court.

This retroactive application problem is especially pertinent in connection with the interference with the obligation of contracts involved in this particular case. Petitioner herein was covered by an insurance policy that was entered into with the consideration of the more favorable defense law of contributory negligence.

Finally, in considering the question of the Constitutional limits on a state's choice-of-law rule, this Court has never considered the effect of the Equal Protection clause in conflict-of-law cases. The only challenges that have ever been

made were based on Due Process and Full Faith and Credit. The question of Equal Protection in this area is of significant importance and it has not been determined by this Court in any prior case. Authors Currie and Schreter considered this possibility in *University of Chicago Law Review*, Volume 28:1.

The decision of the Minnesota Supreme Court applies benefits for its citizens alone, and in so doing discriminates against a foreign corporation. Clearly, the Minnesota Court applies benefits to its residents merely on the basis of the fact that they are residents of the state; foreigners to the state clearly do not have the same protection of law as Minnesota residents. This Court should at least consider this novel question with respect to the Equal Protection clause.

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CONCLUSION

Petitioner respectfully suggests that some word is needed from the Supreme Court in the area of conflicts of law. There have been no decisions from the Court since 1965 dealing with the Constitutional questions, and since that time there has been a complete upheaval of conflicts of law. In addition, this case represents a unique opportunity for this Court to rule on the Constitutional questions involved in the conflicts area, because Minnesota represents the most liberal Constitutional interpretation in the United States. Guidelines from this Court are essential for a valid Constitutional development in the conflicts area.

In addition, this case presents an important question of Equal Protection of laws as that clause of the Constitution applies to the conflicts area. This question has never been decided by the U.S. Supreme Court, and with the rampant development of the conflicts area, word from this Court is desperately needed.

Petitioner respectfully requests that the Petition be granted.

Respectfully submitted.

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APPENDIX

MINNESOA SUPREME COURT OPINION

No. 120

Hennepin County

Yetka, J. Concurring specially, Peterson, J.

ROY SCHWARTZ,

Appellant-Respondent,

vs. 44158, 44281, 44509, 44525

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Respondent-Appellant,

SPECTOR FREIGHT SYSTEM, INC. OF ILLINOIS,

Respondent.

SYLLABUS

1. Under the rule enunciated by this court in Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973), the plaintiff, a Minnesota resident injured in an accident in the State of Indiana who brought suit in Minnesota against defendant corporations, who are nonresident corporations licensed to do business in Minnesota, is entitled to have the Minnesota law of comparative negligence applied, rather than the Indiana law of contributory negligence.

2. The evidence in this case amply supports the verdict for the plaintiff.

3. The case must be remanded to the trial court for consideration of motions not yet decided by that court pending this appeal.

Affirmed in part, reversed in part, and remanded.

Heard before Sheran, C. J., and Peterson, Kelly, and Yetka, JJ., and considered and decided by the court.

OPINION

YETKA, Justice.

Plaintiff brought an action to recover for personal injuries sustained in a three-truck accident in the State of Indiana allegedly due to the negligence of the defendants, Consolidated Freightways Corporation of Delaware and Spector Freight Systems, Inc. Trial before a jury was commenced in Hennepin County District Court on November 20, 1972. Prior to submission of the case to the jury, the court ruled, as a matter of law, that the Indiana rule of contributory negligence would apply rather than the Minnesota comparative negligence provision, Minn. Stat. 604.01. However, at plainiff's request the case was submitted to the jury in the form of special interrogatories requiring percentage apportionment of negligence attributed to each party. The jury returned a verdict finding defendants 90 percent negligent and plaintiff 10 percent negligent. In its conclusions of law, dated December 4, 1972, the court denied recovery to plaintiff based on the aforesaid ruling that the Indiana law of

contributory negligence applied to this case. Plaintiff appeals from the judgment. Consolidated Freightways and Spector Freight appeal from an order of the district court denying their motions to amend or set aside certain answers to special interrogatories. The same order dismissed without prejudice motions of the defendants for judgment n. o. v. or a new trial in the event this court determines that comparative negligence applies.

Affirmed in part, reversed in part, and remanded.

The case at bar arises from a collision involving three semi-tractor-trailer units which occurred on the Indiana tollway.

One vehicle involved in this collision was owned by defendant Consolidated Freightways and driven by an Indiana resident. His codriver was a resident of Ohio. The unit was garaged and maintained in Ohio, but the tractor was licensed in Delaware. Neither the tractor nor the trailer was licensed to operate in Minnesota. At the time of the accident this unit was making a run from Akron, Ohio, to Chicago, Illinois, and was to return to Akron.

A second vehicle involved in the collision was leased to defendant Spector Freight Systems, Inc. This unit was owned and operated by an Ohio resident and maintained and garaged in Ohio. At the time of the accident, this vehicle was delivering a shipment from Cleveland, Ohio, to Kenosha, Wisconsin.

Both Consolidated and Spector are foreign corporations to the State of Minnesota. However, both operate in interstate commerce and are licensed to do business in Minnesota.

The third vehicle involved in the collision was owned by

Northern Cooperative, Inc., of Wadena, Minnesota, and driven by plaintiff. Plaintiff and his codriver had left Wadena to deliver commodities to Toledo and Columbus, Ohio. Thereafter they had picked up a load in Barberton, Ohio, and were en route back to Wadena when the collision took place. Plaintiff is a lifelong resident of Minnesota and currently resides in Wadena. His codriver is also a Minnesota resident. The semi unit belonging to plaintiff's employer is licensed, maintained, garaged, and registered in Minnesota.

The collision in question occurred at approximately 5:05 a.m., November 20, 1964, i nthe westbound side of the Indiana tollway, near the city of Elkhart, Indiana.

The Consolidated vehicle had stopped behind a line of traffic in the right-hand lane due to a stoppage of some sort, resulting from causes which do not appear on the record. The Consolidated driver testified that his warning lights and four-way flashers were in operation at that time. The evidence as to whether this driver had set out flares or fuses is disputed.

The weather conditions at the time of the accident were disputed.

The Spector vehicle then approached the stopped Consolidated unit from the rear and came to a stop directly behind said vehicle.

Plaintiff had been following the same route and traveling in the same lane as defendants' trucks. As he approached them from the rear at a speed of 45 to 50 miles per hour, plaintiff began to pull out into the left-hand lane to pass. He struck the rear of the Spector vehicle, driving it into the rear of the Consolidated unit.

Plaintiff was severely injured and received initial medical treatment at a hospital in Elkhart, Indiana. He was then

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transferred to a hospital in Wadena. Plaintiff has also spent time in a Fargo, North Dakota, hospital in order to receive medical treatment for his injuries.

The issues on this appeal are:

1. Does the Indiana law of contributory negligence or the Minnesota comparative negligence provision apply to the case at bar?

2. Does the evidence support the verdict?

1. Plaintiff places principal reliance on this court's decision in Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973). He urges that the considerations set forth in that opinion are applicable to the case at bar, both in terms of advancement of the forum's legitimate governmental interest and application of the better rule of law.

Defendants take the view that the facts relevant to this choice-of-law question mandate application of Inidana law in this case. They allege that the contacts with Minnesota are less significant than the contacts with Indiana. They further contend that a "better law" analysis is not applicable to comparative versus contributory negligence, and in any case, such analysis is subservient to the overriding interests of Indiana. Defendants also take the view that there must be a "consistent application of one law" and that plaintiff was forum shopping.

In Milkovich v. Saari, *supra,* this court discussed in detail the recent changes in the choice-of-law rules of this and other jurisdictions. With reference to tort cases it was pointed out that the traditional rule of lex loci delecti has been replaced by the more rational choice-of-law methodology first enunciated by Professor Robert Leflar in his article

entitled *Choice-Influencing Considerations in Conflicts Law*, 41 N. Y. U. L. Rev. 267, 279. Adoption of this methodology by this court in Milkovich has in effect replaced the traditional choice-of-law rules with a flexible approach which takes into account policy as well as factual considerations in arriving at a choice of law in a given situation.

As pointed out in Milkovich, only the last two items of Professor Leflar's five-point methodology are relevant to tort cases. These two considerations are: (1) Advancement of the forum's governmental interests and (2) application of the better rule of law.

Advancement of the forum's governmental interests contemplates application both in terms of factual contacts with the forum and in terms of the state's policy considerations relevant to its choice of law.

In Milkovich the only facts linking the forum to the accident were that the accident occurred in this state and that the plaintiff received medical care in this state. Yet, these facts, in concert with policy considerations, were held to create governmental interests on the part of the forum sufficient to support application of Minnesota law, even though the parties were from Ontario and the automobile involved in the accident was, in all respects, linked exclusively to Ontario.

The factual contacts creating a Minnesota interest in the instant case appear much stronger than those factual contacts present in Milkovich. Here, plaintiff is a lifelong resident of Minnesota and sustained his injuries in the course of his employment as a truckdriver for a Minnesota corporation. The vehicle which he was driving was owned by this Minnesota employer, and was licensed, registered, garaged, maintained, and insured in Minnesota. Plaintiff had

a Minnesota driver's license. The excursion which had brought plaintiff to Indiana originated in Minnesota and was to terminate in Minnesota (although the load plaintiff was hauling was to be delivered to Fargo, North Dakota). Plaintiff has received and continues to receive medical care in Minnesota for the injuries sustained in the accident. He currently resides in Minnesota, saddled with crippling physical disabilities arising from the collision. Thus, the economic impact of these injuries and of subsequent litigation will be felt by Minnesota residents. In addition, both defendant corporations, although foreign to Minnesota, are licensed to do business in this state, and presumably exercise this privilege. Minnesota therefore has a clear governmental interest in the outcome of plaintiff's case.

The State of Indiana, on the other hand, has a much less substantial governmental interest. The accident in question occurred in Indiana and plaintiff received initial medical attention in that state. The fact that one of Consolidated's drivers was an Indiana resident is irrelevant since this individual is not a party to the litigation and is therefore not affected by the outcome.

Defendants advance the rather ingenious argument that if the reasoning of Milkovich is applied to the case at bar, then, "obviously, Indiana law would have to apply." However, Milkovich cannot be read as holding that, if that action had been brought in Ontario, an Ontario court could not have applied the Ontario guest statute.

Once jurisdiction attaches, the forum may, subject to the rather minimal due process standards, apply its own choice-of-law rules to determine what law governs the case. Crider v. Zurich Ins. Co., 380 U.S. 39, 85 S.Ct. 769, 13 L.ed.2d 641 (1965); Home Insurance Co. v. Dick, 281 U.S. 397,

50 S.Ct. 338, 74 L.ed. 926 (1930). See, also, Professor Leflar's article entitled *States' Rights in Conflict of Laws*, 19 Ark. L. Rev. 142.

Professor LeFlar also states in *Choice-Influencing Considerations in Conflicts Law*, 41 N. Y. U. L. Rev. 267, 270, 292:

> "* * * The law of the forum F, on choice of law, is the law that courts of forum F will follow.
>
> * * *
>
> "* * * It is not at all unusual for one state to discover that it has such [governmental] interests in a set of facts though another state's courts would say otherwise."

In the instant case, had the litigation been brought in Indiana, it is possible that courts of that state could cite Milkovich as supporting authority for application of Indiana law. But it is incorrect to cite Milkovich as standing for the proposition that, under identical facts, the Minnesota Supreme Court would apply the law of the site of the accident. Milkovich, by adopting the Leflar methodology, has announced that choice-of-law questions in this state will be decided under flexible standards, free from the traditional rules that demanded resolution of such questions on a pure "contacts analysis." Rather, the Leflar methodology demands that choice-of-law issues be decided, not only upon "contacts," but also on *policy* considerations.

While we hold that Minnesota's governmental interest in this case is sufficient to apply the Minnesota comparative negligence statute rather than the contributory negligence law of the State of Indiana so that we need not decide the

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case under the better-law rule, we feel compelled to point out that the jury's findings of only 10 percent negligence on the part of plaintiff and 90 percent on the part of defendants, which verdict would compel judgment for defendants under the law of Indiana, does little to convince us Indiana has the better law. Despite the fact the jury found plaintiff's negligence to be relatively slight, the Indiana rule would leave him to bear the entire burden of his severe injuries. It is within the ambit of this court's power to find such a result contrary to basic state policy. This court as early as 1938, in commenting on the contributory negligence doctrine, then the law in Minnesota, said:

> "No one can appreciate more than we the hardship of depriving plaintiff of his verdict and of all right to collect damages from defendant; but the rule of contributory negligence, through no fault of ours, remains in our law and gives us no alternative other than to hold that defendant is entitled to judgment notwithstanding the verdict. It would be hard to imagine a case more illustrative of the truth that in operation the rule of comparative negligence would serve justice more faithfully than that of contributory negligence." Haeg v. Sprague, Warner & Co. Inc., 202 Minn. 425, 429, 281 N.W. 261, 263 (1938).

Defendants argue that plaintiff was forum shopping. Suffice it to say that the courts of this state are open to those residents and nonresidents alike who properly invoke, within constitutional limitations, the jurisdiction of these courts. In the case at bar, plaintiff is a Minnesota resident who is currently suffering from extensive and severe injuries. It would be at least plausible to presume that Minnesota courts

would be plaintiff's logical choice. Further, it is noteworthy that plaintiff did not first bring his action in another state and then later bring suit in this state.

2. The district court properly denied defendants' motions to amend certain answers given by the jury to interrogatories. There is ample evidence in the record to support the jury's verdict.

3. Those portions of the alternative motions seeking judgment n.o.v. or a new trial, which the trial court dismissed without prejudice, do not appear to have significant merit once the sufficiency of the evidence has been determined. However, since the trial court has not ruled on whether a new trial should be granted on the ground of misconduct of counsel, or on the ground that the verdict was excessive, the case must be remanded to the district court for determinations on renewal of the motions on these two issues alone since we find no error by the trial court on any rulings made heretofore except on the issue, discussed previously, of whether Minnesota or Indiana law should be applied.

Since the accident occurred in 1964, however, and the action was brought in 1969, plaintiff is entitled to a speedy determination of this matter. We remand to the trial court for consideration of the motions for a new trial only on condition defendants renew their motions and file a bond in the amount of the verdict in this case plus interest from the date judgment was initially entered in the district court to the day of the issuance of this opinion. If the bond is not filed within 15 days of the issuance of this opinion, judgment for plaintiff shall be entered.

Affirmed in part, reversed in part, and remanded.

STATE OF MINNESOTA

IN SUPREME COURT

ROY SCHWARTZ,

Appellant-Respondent,

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Respondent-Appellant,

and

SPECTOR FREIGHT SYSTEM, INC. OF ILLINOIS,

Respondent.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE AND SPECTOR FREIGHT SYSTEM, INC. OF ILLINOIS' PETITION FOR REHEARING

PRELIMINARY STATEMENT

Consolidated Freightways Corporation of Delaware and Spector Freight System, Incorporated of Illinois respectfully petition the Supreme Court for a rehearing, requesting a reconsideration and review of the Court's decision, filed August 2, 1974, in regard to paragraph I of the Court's opinion, to consider the respondents' contention that the application of the "Choice of Law" rule used by the Court is in violation of the following Constitutional provisions:

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(1) The Equal Protection clause (U.S. Constitution, Amendment 14);

(2) The Privileges and Immunities clause (U.S. Constitution, Article IV, Section 2 and Amendment 14, Section 1);

(3) The requirement that a state give "full faith and credit" to the "public acts" of another state (U.S. Constitution, Article IV, Section 1):

(4) The Due Process clause (U.S. Constitution, Amendment 14); and

(5) The proscription against the government to interfere with parties' liberty to contract.

These issues were not raised in the trial court level because the trial court held in favor of Respondents. Neither has there been any argument at the Supreme Court level as to the Federal Constitutional issues in view of the fact that the Constitutional challenge is directly against the decision of the Court in the instant case.

ARGUMENT

Respondnets respectfully submit that a conflicts rule applied by the Court is in violation of the "Equal Protection" clause and the "Privileges and Immunities" clause because the Respondents are subject to different rules of law being applied in lawsuits that arose out of the same automobile accident. Something more than the Court's concern for the plaintiff is needed to establish the reasonableness of not allowing the Respondent's Equal Protection of the laws, and to guard against "Invidious Discrimination"

against the corporate Respondents merely because they happen to be within the jurisdiction of the state by virtue of being licensed to do business in Minnesota.

Respondents submit there is a violation of the "Full Faith and Credit" clause of the Constitution where the Court refuses to give recognition to Indiana law where an accident occurred between three interstate-traveling trucks. This is exemplified by the fact that much of the Indiana law with regard to traffic regulations was accepted without any question, whereas the substantive law of negligence for the state of Indiana was disregarded.

The application of the comparative negligence statute of Minnesota in a lawsuit arising out of a traffic accident that occurred prior to the enactment of the statute interferes with the contractual rights of the Respondents and their insurance companies. Ths econtracts were based on risk factors that contemplated the application of the law that was in effect at the time the policy was purchased.

Furthermore, the Respondents have been denied Due Process of law by the application of the comparative negligence statute retroactively in a lawsuit where the cause of action accrued prior to the time the statute was enacted.

Respondents Consolidated Freightways Corporation and Spector Freight System urge that the Supreme Court grant a hearing to fully present its arguments in these areas.

Respectfully submitted,

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STATE OF MINNESOTA

OFFICE OF CLERK OF SUPREME COURT

ST. PAUL, MINN.

October 2, 1974

ROY SCHWARTZ,

Appellant-Respondent,

vs. 44158, 44281, 44509, 44525

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Respondent-Appellant,

SPECTOR FREIGHT SYSTEM, INC., OF ILLINOIS,

Respondent.

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petitions for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

JOHN McCARTHY
Clerk Supreme Court

No. 303 HENNEPIN COUNTY PER CURIAM

ROY SCHWARTZ,

Respondent,

45553 vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Appellant,

SPECTOR FREIGHT SYSTEM, INC. OF ILLINOIS,

Appellant.

Considered and decided by the court without oral argument.

OPINION

PER CURIAM.

On November 20, 1964, plaintiff was injured when the truck which he was driving on the Indiana tollway collided with trucks owned by defendants Consolidated Freightways Corporation of Delaware and Spector Freight System, Inc., of Illinois. Subsequently, plaintiff brought an action against defendants in Minnesota. In answers to special interrogatories, the jury apportioned 10 per cent of the negligence to plaintiff and 90 percent to defendants (60 percent to Consolidated and 30 percent to Spector), but the trial court ruled that plaintiff could not recover because the Indiana contributory negligence law applied. In Schwartz v. Consolidated Freightways Corp. 300 Minn. 487, 221 N. W. 2d 665 (1974), we reversed the trial court and held that the Minnesota comparative negligence law applied. However,

we remanded the case to the trial court for a ruling on defendants' motion for a new trial, which was based on allegations of excessive damages and misconduct of plaintiff's counsel in closing argument. The trial court ruled against defendants; and the present appeal, limited solely to the issue of misconduct, followed. After the appeal was filed by defendants, defendant Consolidated and plaintiff apparently reached a settlement and Consolidated was dismissed as a party appellant, but Spector continued its appeal. After carefully considering Spector's appeal, we affirm.

The question of whether a new trial should be granted because of an alleged improper argument of counsel rests almost wholly in the discretion of the trial court, and this court will reverse only for a clear abuse of discretion. Kramer v. Kramer, 282 Minn. 58, 162 N. W. 2d 708 (1968). Defendant has failed to demonstrate that the trial court abused its discretion.

First, there is no indication in the record which defendant has provided to this court[1] that defendant sought corrective instructions before the jury retired. We have held in numerous cases that, in the absence of an argument which is so outrageously flagrant that the trial court should act on its own motion, a party who fails to request corrective instructions before the jury retires waives any later claim that the statements of opposing counsel were so improper as to justify a new trial. See, Pelzer v. Lange, 254 Minn. 46, 93 N. W. 2d 666 (1958).

Second, we cannot determine from the record how strong or how weak each party's evidence was, whether defense

[1]The record on appeal consists of a transcript of the closing argument by plaintiff's counsel and of a statement of the case prepared by the trial court under Rules 110.04 and 110.05, Rules of Civil Appellate Procedure, for the prior appeal.

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counsel overstepped the bounds of propriety, or to what extent the trial court gave corrective instructions. As to the importance of these matters in determining prejudice, see Kramer v. Kramer, *supra;* Colgan v. Raymond, 275 Minn. 219, 146 N. W. 2d 530 (1966); Ellwein v. Holmes, 243 Minn. 397, 68 N. W. 2d 220 (1955).

Third, it is of some relevance that a special verdict was used. In a case involving a claim of misconduct in closing argument, we stated, "By their nature special interrogatories remove from the jury the temptation to exercise or engage in passion, bias or prejudice. That is one of the purposes for using special verdicts." Kramer v. Kramer, 282 Minn. 58, 72, 162 N. W. 2d 708, 717.

In summary, we have concluded that although parts of the closing argument of plaintiff's counsel may have been objectionable, defendant has not sufficiently shown the need for a new trial.

Affirmed.

Endorsed Filed December 19, 1975

JOHN McCARTHY, Clerk
Minnesota Supreme Court

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IN THE

Supreme Court of the United States

October Term 1975

No. 75-1284

SPECTOR FREIGHT SYSTEM, INC. OF ILLINOIS,
Petitioner,

vs.

ROY SCHWARTZ,
Respondent.

RESPONDENT'S REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term 1975

No. 75-1284

SPECTOR FREIGHT SYSTEM, INC. OF ILLINOIS,
Petitioner,

vs.

ROY SCHWARTZ,
Respondent.

RESPONDENT'S REPLY BRIEF

QUESTIONS PRESENTED FOR REVIEW

1. When Federal constitutional issues are not raised at trial or on appeal to the State Supreme Court, should the United States Supreme Court take jurisdiction to entertain a Petition for Writ of Certiorori?

2. May a State apply its Conflicts of Law Rules, held to be procedural, in its own best interests, when it enforces its decision equally against all parties involved, and provides adequate and equal methods to all parties to insure due process and equal protection?

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STATEMENT OF THE CASE

Respondent brought an action in his home State, Minnesota, to recover for personal injuries sustained in a Three (3) truck collision which occurred in the State of Indiana due to the negligence of Petitioner, Spector Freight System, Inc., and Consolidated Freightways Corporation of Delaware (not a party). The collision occurred on November 20th, 1964.

Respondent's vehicle was owned and operated by a Minnesota Corporation, garaged and licensed in Minnesota. Petitioner's vehicle was leased from an Ohio owner. The third vehicle was owned by Consolidated and licensed in Delaware.

Service was made to initiate this action by Respondent by service on Petitioner's duly appointed agent for service in the State of Minnesota and Petitioner answered, submitting to Minnesota jurisdiction.

The action was tried to a jury in District Court, Fourth Judicial District, State of Minnesota, and a verdict on special Interrogatories found the Consolidated Defendant Sixty Per Cent (60%) negligent, the Petitioner Thirty Per Cent (30%) negligent, and Respondent Ten Per Cent (10%) negligent. On motion, the trial Court entered judgment against Respondent ruling that contributory negligence barred Respondent from any recovery.

On appeal by Respondent, the Minnesota Supreme Court, Justice Yetka, reversed trial Court: holding that under Minnesota's Conflict of Laws Rules Minnesota's Comparative Negligence Statute applied to this case. In his opinion, Justice Yetka stated "while we hold that Minnesota's governmental interest is sufficient to apply the Minnesota Comparative Negligence Statute rather than the Contributory Negligence Law of the State of Indiana so that we need not decide the case under

the "better law rule", we feel compelled to point out that the jury's findings of only Ten Per Cent (10%) negligence on the part of Plaintiff and Ninety Per Cent (90%) negligence on the part of Defendants does little to convince us Indiana has the better law".

Petitioner did not argue or raise any constitutional issues at trial — on appeal — on its cross appeal — or on its first Petition for rehearing.

Petitioner, in a second Petition for rehearing, which was denied, attempted for the first time, to raise constitutional issues. After a subsequent appeal, again on other issues, Petitioner applied for this Writ of Certiorari raising, for the first time, constitutional issues.

ARGUMENT - JURISDICTION

Petitioner has made application for Writ of Certiorari attempting to raise alleged constitutional issues. The allowance of such a Writ is governed by revised Rule 19 of the Supreme Court of the United States which governs review on Certiorari. It reads in part:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.
>
> Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions on this court.

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The decision of the Minnesota Supreme Court sought to be reviewed herein was filed on August 2nd, 1974. Following such decision, Petitioner filed, not one, but two Petitions for rehearing before said Court and subsequently a second appeal, decided December 19th, 1975.

Minnesota Rule of Civil Appellate Procedure 140 governs procedure followed in Petitions for rehearing. In substance, it allows a Petition for rehearing to be filed within Ten (10) days after the filing of the decision unless the time is enlarged by order within the Ten (10) day period. (A copy of the Rule appears in full in the Appendix; p. A-1).

The first application for rehearing was presented to the Minnesota Supreme Court making complaint of certain alleged errors of admission of evidence during the trial; there were no constitutional issues raised in the first Petition for rehearing nor in any of the Court proceedings prior thereto, nor in its second appeal.

Following the first rehearing, Petitioner in this Writ, Spector Freight System, Inc., on August 29th, 1974, Twenty-seven (27) days after the above decision, applied to the Minnesota Supreme Court for a second opportunity to present a Petition for reargument. A letter (copy of which appears in the Appendix; p. (A-1) dated August 29th, 1974, from Spector Freight System's Counsel to the Minnesota Supreme Court, quoting:

> I have now been advised by my associates in Chicago that the general counsel for Spector Freight System, Mr. Irwin, as well as the general counsel for one of the reinsurers. Transport Insurance Company of Texas, have been on vacation and because of this, they were not able to make the necessary decision in regard to further appeal.

> I have now been advised to proceed with a petition for rehearing on constitutional grounds by the client. Such a Petition will necessarily require substantial research prior to submission, and I respectfully request an extension of time in which to file same to Monday, September 30th, 1974.

Minnesota's procedure requires certain prerequisites before a constitutional issue can be raised. These requirements include the following:

> When the constitutionality of an act of the legislature is drawn in question in any action to which the state or an officer, agency or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford him an opportunity to intervene.

Minnesota Rules of Civil Procedure for the District Court, Rule 24.04.

> When the constitutionality of an act of the legislature is drawn in question in any proceeding in the Supreme Court to which the state or an officer, agency, or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof.

Minnesota Rules of Civil Appellate Procedure, Rule 144.

"The failure to give proper notice of a challenge on constitutional ground to the Attorney General is jurisdictional." *State of Minnesota v. Roger Ettesvold*, 263 Minn. 411, 117 N.W.2d 1 (1962); *Village of Farmington v. Minnesota Municipal Commission*, 284 Minn. 125, 170 N.W.2d 197 (1969).

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It appears that the attempt to raise constitutional issues in this matter was an afterthought following the trial, following appeal to the Minnesota Supreme Court and following a Petition for rehearing. It was Twenty-seven (27) days after the Courts decision from the first appeal, and after the Courts denial of the first Petition for rehearing, that Petitioner attempted to raise a constitutional issue. This was followed by a second appeal decided December 19th, 1975, which made no reference to constitutional issues.

The required notice to the Attorney General for the State of Minnesota was not served and the Petition for rehearing on the alleged constitutional grounds was denied for lack of jurisdiction.

The Petitioner did not follow the required procedural rules pursuant to either the Minnesota District Court rules nor the Minnesota Appellate Rule as above outlined. The Petitioner here has not presented this Court with the required jurisdiction. The State Court did not decide a Federal question of substance, nor has it decided it in any way as required by Rule 19, supra. It was just not presented to it.

The United States Supreme Court does not grant certiorari under 28 U.S.C. 1257 (3), c. 646, 62 Stat. 929 for merely any Federal question presented to it. The Court has held time and again that the issue must provide a substantial Federal question and must have been raised in a proper and timely manner in the State Courts.

The timeliness with which the Federal questions were raised has been held to be critical and largely a matter for the State Court to regulate by its own procedural rules. *National Mutual Building and Loan Assc. v. Brakan*, 193 U.S. 635 (1964) and *Reece v. Georgia*, 350 U.S. 85 (1955).

In *Henry v. Mississippi*, 379 U.S. 443 (1965) the Court stated that it would decline to review State Court judgments which rest on adequate State grounds even if they also decide Federal questions. This affirmed an earlier statement the Court had made in *Walters v. City of St. Louis, Missouri*, 347 U.S. 231 (1954), where the Court stated simply that it would not pass on what the Court below had not decided.

Louisville and Nashville R. Co. v. Woodford, 234 U.S. 46 (1914). See also, *Erie R. Co. v. Pardy*, 185 U.S. 148 (1902) and *Baldwin v. Kansas*, 129 U.S. 52 (1889).

ARGUMENT

In the event the Petition is not dismissed on the above jurisdictional grounds, it should be dismissed on the merits for the following reasons.

Due process has been complied with. Petitioner was properly served by service upon its duly appointed agent for service in the State of Minnesota. Petitioner does business in the State of Minnesota. Following service, Petitioner answered, submitting to the jurisdiction of the State of Minnesota. Minnesota has and had jurisdiction.

Of what does Petitioner complain?

Comity does not require that the States enforce laws repugnent to their own. Minnesota has adopted the comparative negligence statute, Minnesota Statute 604.01 Subdivision 1 which reads as follows:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for neglience resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery

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> is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.

By such passage Minnesota has adopted comparative negligence as a public policy. This law applies equally to all persons and parties who come within its jurisdiction and has been held procedural.

In 1969, the Minnesota Court ruled that the Minnesota Comparative Negligence Statute, M.S. 604.01 enacted in 1969 must apply to any action, the trial of which commenced after July 1, 1969. The Court held that such statute could constitutionally be held retroactive in effect. *Peterson v. City of Minneapolis*, 285 Minn. 282, 173 NW2d 353 (1969); *Barnes v. Hammerschmidt*, 289 Minn. 181, 182 NW2d 875 (1971).

The Court held that the legislation did not interfere with vested rights and further compared the Comparative Negligence Law to a Statute of Limitations; holding that both were procedural rather than substantive in nature, saying that:

> It is generally held that legislation dealing only with remedies and procedures are not beyond the reach of retrospective legislation.

The Court further stated that the result does not, in effect, do away with contributory negligence but simply requires, as the Court stated:

> A balancing of the degree of Plaintiff's negligence against that of the Defendant.

By application of its own choice of law rules, Minnesota has determined what law governs the case following the principles set forth in *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965) in applying its conflicts of law rules and determining whether a given question is substantive or procedural. *Anderson v. State Farm Mutual Auto Ins. Co.*, 222 Minn. 428, 24 NW2d 836 (1946). In doing so it has ruled that the comparative negligence statute is procedural and has thus applied Minnesota's Conflict of Law Rules determining that Minnesota Statute 604.01 should apply to negligence actions venued in Minnesota Courts. *Peterson and Barnes, supra.*

Minnesota has consistently rejected and refused to apply foreign laws which were contrary to its public policy. *Blats v. Blats*, 273 Minn. 419, 142 NW2d 66 (1966). *Schneider v. Nichols*, 280 Minn. 139, 158 NW2d 254 (1968). *Kopp v. Rechtzigel*, 273 Minn. 441, 141 NW2d 526 (1966). *Bolgrean v. Stich*, 293 Minn. 8, 196 NW2d 442 (1972).

The Minnesota Legislature expressed its confidence that comparative negligence was a better rule by enacting the same into law while expressly rejecting contributory negligence. Subsequently, the Minnesota Supreme Court endorsed the legislature's actions by expressly stating in *Peterson v. City of Minneapolis*, supra that comparative negligence was the better rule. In *Milkovich v. Saari*, 295 Minn. 520, 203 NW2d 408 (1973) the Minnesota Court again expressly rejected the Lex loci Doctrine basing its decision primarily on the case law of

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New York and New Hampshire; stating that in dealing with choice of law problems Minnesota has chosen a methodology of analysis rather than a series of rules, and that Minnesota will follow the better law concept in choice of law situations.

With all due respect to the "head count" of the listed jurisdictions in Petitioner's Brief, it appears there is little, if any, substantial differences in the jurisdictions which follow "the most significant contact rules", the "governmental interest analysis" doctrine and the "choice influencing considerations".

It can be seen that Minnesota, the Restatement (Second) of Conflict of Laws, sec. 6 and many other jurisdictions have changed from the hard and fast rule of Lex loci to allowing either the law of the forum or the law of the foreign State to be applied, depending on the respective interests and contacts.

As discussed previously, both the Minnesota State Legislature and the Minnesota State Supreme Court have expressed their approval of the Minnesota Comparative Negligence Statute. There is little question that in this case, or any case, Minnesota Negligence law is the better law assuring fair and equitable results and effectuating State public policy. Minnesota is intimately and significantly concerned with the final disposition of this matter.

No resident or corpration of Indiana is concerned nor was any property of a resident or corporation of that State damaged. Indiana's only tie with the present action is that it was the site of the collision.

On the other hand, Minnesota is intimately and significantly concerned with the final disposition of this matter and as stated by the Courts opinion:

> The factual contacts creating a Minnesota interest in the instant case appear much stronger than those factual con-

tacts present in Milkovich. Here, plaintiff is a lifelong resident of Minnesota and sustained his injuries in the course of his employment as a truck driver for a Minnesota corporation. The vehicle which he was driving was owned by this Minnesota employer, and was licensed, registered, garaged, maintained, and insured in Minnesota. Plaintiff had a Minnesota driver's license. The excursion which had brought plaintiff to Indiana originated in Minnesota and was to terminate in Minnesota (although the load plaintiff was hauling was to be delivered to Fargo, North Dakota). Plaintiff has received and continues to receive medical care in Minnesota for the injuries sustained in the accident. He currently resides in Minnesota, saddled with crippling physical disabilities arising from the collision. Thus the economic impact of these injuries and of subsequent litigation will be felt by Minnesota residents. In addition, both defendant corporations, although foreign to Minnesota, are licensed to do business in this state, and presumably exercise this privilege. Minnesota therefore has a clear governmental interest in the outcome of plaintiff's case.

CONCLUSION

Respondent respectfully submits that Petitioner has wholly failed to properly raise any Federal constitutional questions in a timely manner in State Court as required by Minnesota Rules of Civil Procedure, Minnesota Rules of Civil Appellate Procedure and the Case Law of this Court. Thus the jurisdiction of this Court should not be exercised to grant the requested Writ of Certiorari.

Once jurisdiction attached, the State of the forum may, subject to due process standards, apply its own choice of law rules to determine what law governs the case. The application by the State of Minnesota of its conflict of law rules is a State procedural matter. The Minnesota Courts have provided adequate methods to all parties to protect their constitutional rights. Under Minnesota's Conflict of Law Rules, its Comparative Negligence Law was properly applied.

Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

FLETCHER LAW OFFICES, LTD.

By John F. Fletcher
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APPENDIX

RULE 140. PETITION FOR REHEARING

A petition for rehearing may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period. The petition shall set forth with particularity any controlling statute, decision, or principle of law, any material fact, or any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied, or misconceived. The petition shall be served upon the opposing party who may answer within 5 days thereafter. Oral argument in support of the petition will not be permitted. Eleven copies of the petition, produced and sized as required by Rule 132.01, shall be filed with the clerk, except that any duplicated copy, other than a carbon copy, of a typewritten original may also be filed. A filing fee of $25.00 shall accompany the petition for rehearing. The filing of a petition for rehearing stays the entry of judgment until disposition of such petition. It does not stay the taxation of costs.

August 29, 1974

Mr. John McCarthy
Clerk of Supreme Court
Room 230—State Capitol
St. Paul, Minnesota 55101

Dear Mr. McCarthy:

Re: Schwartz v. Consolidated v. Spector, et al File No. 44158, 44281, 44509, 44525

As I indicated in our phone conversation of August 29, I did not receive the Court's decision in the above matter until Wednesday, August 7, because of the fact that it had first been

sent to my former office and was then forwarded by them. I was not able to reach my principal until Friday, August 9. I did thereafter have several discussions with my client's Chicago counsel regarding possible appeal to the U. S. Supreme Court. They asked for time to reflect on the decision and in that connection, I asked for and received from the Court a ten-day extension to August 22 in which to file a petition for rehearing, which would, for the first time, raise certain Constitutional grounds.

I have now been advised by my associates in Chicago that the general counsel for Spector Freight Systems, Mr. Irwin, as well as the general counsel for one of the reinsurers, Transport Insurance Company of Texas, have been on vacation and because of this, they were not able to make the necessary decision in regard to further appeal.

I have now been advised to proceed with a petition for rehearing on Constitutional grounds by the client. Such a petition will necessarily require substantial research prior to submission, and I respectfully request an extension of time in which to file same to Monday, September 30, 1974.

Thank you very much for your willingness to present this request to the Court.

Sincerely,

GEORGE M. ROEHRDANZ

GMR/kc

cc: Mr. John F. Fletcher
Mr. Robert J. McGuire
Mr. Leroy A. Garr

24.04 Notice to Attorney General

When the constitutionality of an act of the legislature is drawn in question in any action to which the state or an offi-

cer, agency or employe of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford him an opportunity to intervene.

RULE 144. CASES INVOLVING CONSTITUTIONAL QUESTIONS WHERE STATE IS NOT A PARTY

When the constitutionality of an act of the legislature is drawn in question in any proceeding in the Supreme Court to which the state or an officer, agency, or employee of the sttae is not a party the ,party asserting the unconstitutionality of the act shall notify the attorney general thereof.

604.01 Comparative negligence, effect

Subdivision 1. Scope of application. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, however, that each shall remain jointly and severally liable for the whole award.

No. 75-1294

SPECTOR FREIGHT SYSTEM, INC. OF ILLINOIS,
Petitioner,

vs.

ROY SCHWARTZ,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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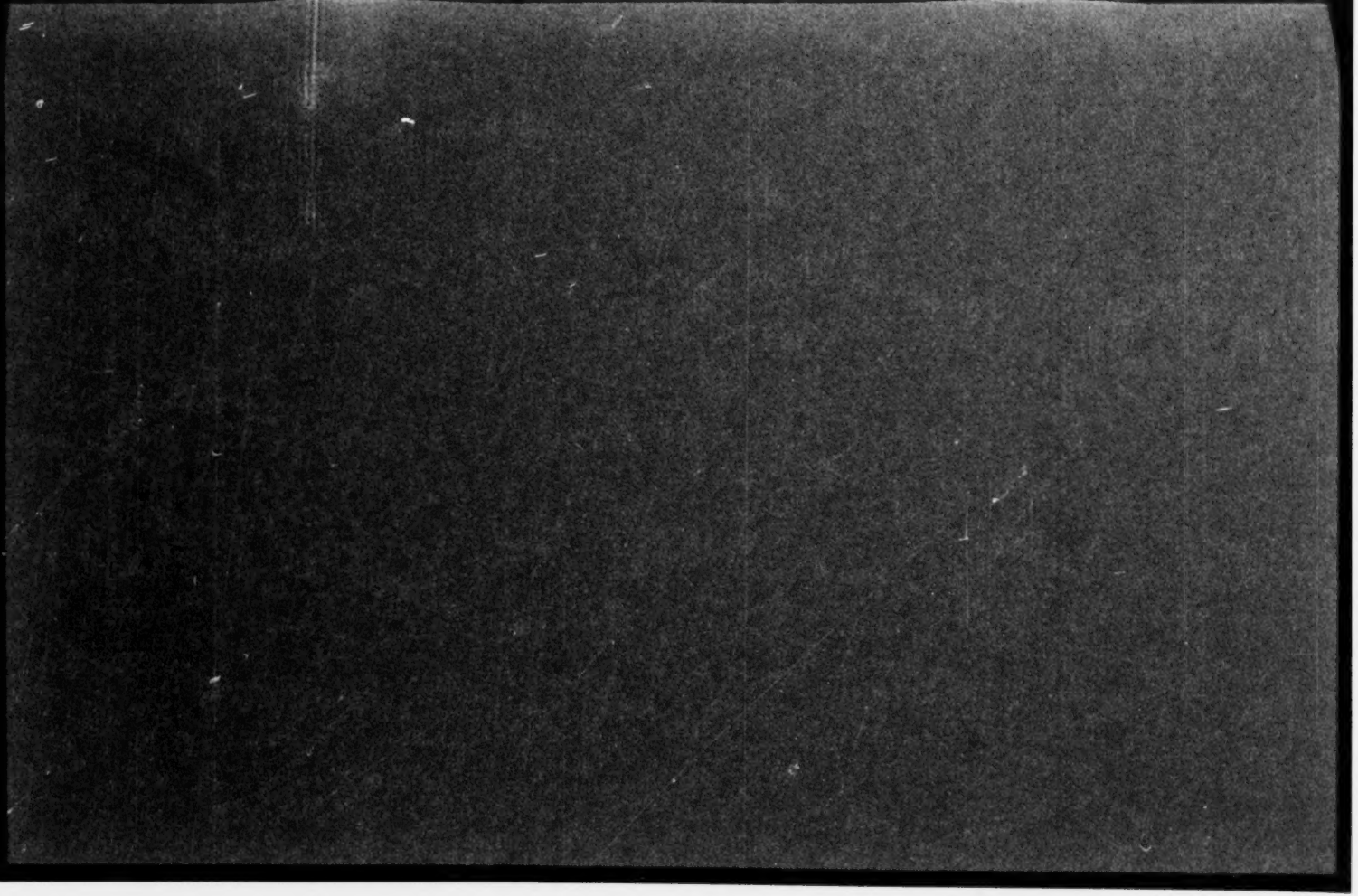

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In The

Supreme Court of the United States

OCTOBER TERM 1974

No. 75-1284

SPECTOR FREIGHT SYSTEM, INC. OF ILLINOIS,
Petitioner,

vs.

ROY SCHWARTZ,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner submits this reply brief to specifically contradict significant portions of Respondent's Brief in Opposition submitted to the Court subsequent to the filing of our Petition for Writ of Certiorari. In Respondent's brief challenge is made to the jurisdiction of this Court to consider our Petition. This objection is without merit.

In substance, Respondent alleges that the Federal questions presented to this Court were not timely raised in the lower court. Even assuming, *arguendo,* that the Federal questions were not timely raised, that objection is moot and irrelevant in view of the fact that the Minnesota Supreme

Court considered and expressly decided the Federal questions in their opinion.

The U. S. Supreme Court has held that it is irrelevant whether Federal questions were raised at any time by the Petitioner if the lower court actually decided the matter in its opinion. In *Chambers v. Baltimore and O. R. Company*, 28 S. Ct. 34, 207 U.S. 142, 52 L. Ed. 143, this Court held that the objection that the Federal question is not properly and seasonably raised in the state court is not available to defeat the jurisdiction of the Supreme Court of the United States where it clearly appears from the opinion of that court that the Federal question was assumed to be an issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered. In *Chambers*, the Court stated at Page 35 S. Ct., "The defendant objects to our jurisdiction to re-examine the judgment because the Federal question was not properly and seasonably raised in the courts of the state. But clearly, it unmistakably appears from the opinion of the Supreme Court that the Federal question was assumed to be an issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered. This is enough to give this Court the authority to re-examine that question on writ of error."

To further support this position, in *People of State of Illinois v. Board of Education*, 68 S. Ct. 461, 333 U.S. 203, 92 L. Ed. 648, 2 A.L.R. 2d 1338, the court stated at Page 463 S. Ct. and Page 207 U.S., "A third ground for the motion is that the appellant failed to properly present in the state supreme court her challenge that the state program violated the Federal Constitution. But in view of the express rulings of both state courts in this question, the argu-

ment cannot be successfully maintained. The motion to dismiss the appeal is denied."

In *Raley v. State of Ohio,* 79 S. Ct. 1257, 360 U.S. 423, 3 L. Ed. 2d 1344, the Court stated at Page 1265 S. Ct., and 436 U.S., "There can be no question as to the proper presentation of a Federal claim when the highest state court passes on it. See *Manhatten Life Insurance Company of New York v. Cohen,* 234 U.S. 123, 134, 34 S. Ct 874, 877, 58 L. Ed. 1245."

In *Cohen,* the Court stated at Page 877, "Let it be conceded, as we think it must be, where the record leaves no doubt that rights under the Full Faith and Credit clause were essentially involved and were necessarily passed upon, there would be jurisdiction to review even though such rights had not been expressly asserted below. . . . The right to review under such condition being in effect for the result of the elemetnary rule that *it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided.*" (Emphasis added)

The above holdings are strengthened by the fact that this issue was considered very recently in *Jenkins v. Georgia,* 94 S. Ct. 2750, 418 U.S. 153, 41 L. Ed. 2d 642 (1974). In *Jenkins,* the Court found that where a state supreme court reached and decided a Constitutional issue, the issue could be considered by the United States Supreme Court whether or not the issue was raised by the appellant on state appeal. In that case, Justice Rehnquist stated at Page 2753 S. Ct., 157 U.S., "We now turn to the question of whether appellant's exhibition of the film was protected by the 1st and 14th Amendments, the question which appellee asserts is not properly before us because appellant

did not raise it on his state appeal. But whether or not appellant argued this Constitutional issue below, it is clear that the Supreme Court of Georgia reached it and decided it. That is sufficient under our practice. *Raley v. Ohio,* supra."

Clearly, the above holdings present conclusive authority for the proposition that there is no merit to the contention of the Respondent that the Petitioner did not seasonably raise the Federal questions, since it is deemed to be irrelevant in view of the fact that the Minnesota Supreme Court considered and decided the Federal questions involved.

The above holdings also have substantial foundation in the history of this Court. As early as 1836 *Crowell v. Randell,* 35 U.S. 368, the Court held that in determining whether the record in a case from the state court shows that the point giving jurisdiction to the Supreme Court was raised and decided in the state court, it is not indispensable that it should appear in the record in totidem verbis or by direct and positive treatment. The Court held in that case that it is sufficient that if it is clear from the facts stated, by just and necessary inference, that the question was made and that the state court must, in arriving at its judgment, have decided that question, then jurisdiction is proper. There is no question that the Minnesota Court intended to consider the Federal questions when they specifically referred to them in their opinion. Clearly, the Minnesota Court took the position that there were no Constitutional barriers to the conflicts rule that they used in this case. Consequently, a determination of the Constitutional questions was made by the lower court and this Court has jurisdiction.

This Court held in *Dewey v. City of Des Moines,* 19 S.

Ct. 379, 173 U.S. 193, 43 L. Ed. 655, that if the decision of the state court was such that the judgment and its necessary effect was a denial of the right claimed or referred to, this is sufficient to grant Federal jurisdiction, even though the state did not notice the question. In our case, the record is much stronger than *Dewey* since the state supreme court actually decided the Federal problems in their decision.

Clearly, the Minnesota Supreme Court, deciding the most liberal holding ever before rendered by any state in the Union, specifically considered the Federal implications of what they were doing. For this reason, they specifically stated in their opinion that their holding was not limited by Federal Constitutional standards. The *Crider* case cited by the Minnesota Court specifically considered the question of full faith and credit. By citing and considering the case of *Home Insurance Co. v. Dick,* the Minnesota Court specifically considered the question of due process.

In *American Fire Insurance Co. v. King Lumber,* 39 S. Ct. 431, 24 U.S. 2, 63 L. Ed. 810 (1919), this Court, considering a motion to dismiss on the grounds that the Federal questions were not passed on by the courts of the state, was denied because that proposition was disputed, and the Court stated that justice would be better served by considering the question since it was in dispute. Here there can be no dispute that the Federal questions were considered by the lower court and passed on them in their opinion. But even if there were, the matter that is raised is of such far-reaching and important consequence that this Court should consider the merits of it in order to better serve justice and add stability to the conflict of laws rules. If Respondent persists in his contention that this Court does not have jur-

isdiction, he is free at a later date to make a motion under Rule 35 of the Supreme Court Rules.

Notwithstanding the above holdings that support the proposition that timeliness of presenting the Federal questions is irrelevant where the state court considered and decided the Federal questions, the record will show that Petitioner did in fact timely raise all Federal objections. Petitioner prevailed in the trial court level when the Minnesota District Court held that Indiana law applied to the case. When the Minnesota Supreme Court reversed that decision, applying the law that Petitioner contends was unconstitutional, Petitioner filed a Petition for rehearing with the Minnesota Supreme Court stating its Federal objections. Obviously, Petitioner would not object or raise any Federal questions at the trial court level when it prevailed on that issue. As soon as the Minnesota Court abridged the Federal rights of the Petitioner, the Federal questions were properly raised. It was at that time when the Petitioner first became the initiating party and was capable of presenting the Federal objections. Petitioner could not reasonably anticipate that the decision of the lower court would be reversed by the Minnesota Court extending its conflicts rules further than any other state in the Union. In Minnesota, a respondent in an appeal from a trial court is not required to anticipate that he will be reversed on appeal. This was the position of the Minnesota Court most recently stated in *Kirckof Plumbing and Heating Co. v. State of Minnesota,* — Minn. —, — N.W. 2d —, filed April 2, 1976.

The allegations in Respondent's brief that our Petition for rehearing was not timely filed and that the Petition for Rehearing was denied for lack of jurisdiction are sim-

ply not true and unsupported by the record. An Order of Justice James C. Otis of the Minnesota Court dated September 3, 1974, included in the Appendix, demonstrates the time for filing our Petition for re-argument was specifically extended. In the Order, Justice Otis stated, "IT IS ORDERED that the time within which the Respondent's Petition for Rehearing may be served and filed be and hereby is extended to include September 30, 1974." Clearly, since Justice Otis of the Minnesota Court ordered the extension of time to file our Petition for Rehearing, it cannot be reasonably argued that the Petition was not timely filed in the Minnesota Court. Rule 102 of the Rules of Civil Appellate Procedure for Minnesota, which is the same as Federal Appellate Rule 2, provides that the Supreme Court may suspend the requirement or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction. Consequently, there can be no doubt that Justice Otis had the power to extend the time for filing our Petition for Rehearing to September 30, 1974. Rule 102 is specifically set out in the Appendix.

The record included in this Appendix also demonstrates that the Petition was filed within the time limits set by Justice Otis, by a Notice of Filing dated September 27, 1974. The documents included in the Appendix also show that the Petition for re-argument of Petitioner was denied by the Minnesota Court on October 2, 1974. The October 2, 1974 Order of the Court states only that the Petitions are denied; there is no statement that the Petition was dismissed for lack of jurisdiction as stated on Page 6 of Respondent's brief.

The allegation in Respondent's brief that Petitioner is

lacking jurisdiction in the U. S. Supreme Court because of a failure to give notice to the state Attorney General is patently unmeritorious. The Rules of Court cited on Page 5 of Respondent's brief specifically state that the notice requirement only applies when an *act of the legislature* is drawn in question. The question involved in this lawsuit is an *act of the court* and the Rule of Notice is clearly not applicable to the Minnesota Court. Notwithstanding that important distinction, there is no merit to the contention that the failure to give notice to the Attorney General is jurisdictional as stated on Page 5 of Respondent's brief. The Minnesota decisions cited by Respondent for that position have been specifically overruled by the Minnesota Court in *Elwell v. County of Hennepin*, 221 N.W. 2d 538, — Minn. — (1974), wherein the Court stated at Page 545 N.W. 2d, "We expressly overrule the *Oak Center* case and hold that the failure to serve notice upon the Attorney General under the rules does not deprive this Court of jurisdiction on appeal."

Respondent attaches weight to the fact that two Petitions for Rehearing were decided in the case. However, there were two Defendants in the case at the time the Supreme Court rendered its decision of August 2, 1974, and each Defendant filed a Petition for Rehearing. As shown by the letter of Petitioner's counsel that Respondent included in his brief, it was contemplated that SPECTOR FREIGHT SYSTEM, INC. of Illinois would raise the Federal questions in its Petition for Rehearing. This is further supportwhere he stated that "Respondent's" Petition for Reheared by the Order of Justice Otis, dated September 3, 1974, ing may be served and filed. In that Order, Justice Otis is obviously referring to a single Respondent, as the nota-

tion at the top of the Order refers to SPECTOR FREIGHT SYSTEM as "Respondent", and it refers to CONSOLIDATED FREIGHTWAYS as "Respondent-Appellant". The letter of Petitioner's counsel dated August 29, 1974, and the Order of Justice Otis dated September 3, 1974, clearly show that only one Petition for rehearing was filed by Petitioner, even though each Petition for Re-argument naturally contained the names of both the Defendants since their positions were identical.

Respondent also attaches significance to the fact that no Federal questions were raised in a cross-appeal by Petitioner. The record shows that no such cross-appeal by Petitioner was ever made. The record shows that only co-Defendant CONSOLIDATED FREIGHTWAYS cross-appealed and there was no appeal taken by SPECTOR FREIGHT. This is demonstrated by the notation in the Order of Justice Otis dated September 3, 1974, included in this Appendix, which shows that only CONSOLIDATED FREIGHTWAYS was a cross-appellant.

Nor is there any merit to the suggestion that Petitioner somehow waived its Federal objections by not raising any Federal questions in its second appeal. Clearly, Petitioner was without power to do so in view of the last part of the August, 1974 opinion where the Minnesota Court limited the questions on remand to misconduct of Plaintiff's counsel and excessiveness of the verdict.

CONCLUSION

This Court has held in *Jenkins* and *Raley* that if the Federal questions are actually considered by the lower court, the timing and the manner that they were raised is irrelevant. Because the Minnesota Court expressly decided

the Federal questions in their opinion, objections on the basis of timeliness and manner are irrelevant.

Moreover, the Federal questions were raised at the first opportune time by the Petitioner.

In addition, the reliance of Respondent on overruled Minnesota cases to defeat jurisdiction is clearly misplaced. The challenge by Petitioner is of the ruling of the state supreme court.

At this stage in the proceedings, all questions of state law have been decided and the only remaining question to be decided is the constitutionality of the choice of laws rules liberally applied by the Minnesota Supreme Court. This question is of significant Federal importance and completely determines the outcome of this case. These complicated Federal questions should be decided by this Court. If this Court decides that Minnesota abridged the constitutional rights of Petitioner, the result of the case would be exactly opposite. Consequently, there is absolutely no merit to the contention that the decision rests on state grounds since the matter is completely controlled by Federal law at this point.

Respectfully submitted,

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212 Ridgewood Avenue
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(612) 871-3803
Attorneys for Petitioner

APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT

August 12, 1974

ROY SCHWARTZ,
Appellant-Respondent,

vs. 44158, 44281, 44509, 44525

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
Respondent-Appellant,

SPECTOR FREIGHT SYSTEM, INC., OF ILLINOIS,
Respondent.

ORDERED that the time within which the petition for rehearing of respondent Spector Freight System, Inc. must be served and filed herein be and it is hereby extended to include August 22, 1974.

Dated Aug. 13, 1974.

/s/ JAMES C. OTIS
Associate Justice

(Title of Cause—In Supreme Court.)

ORDER

Upon the application of counsel for respondent Spector Freight System, Inc.,

IT IS ORDERED that the time within which the respondent's petition for rehearing may be served and filed be and hereby is extended to include September 30, 1974.

NO FURTHER EXTENSIONS WILL BE GRANTED.

Dated: September 3, 1974.

BY THE COURT

/s/ JAMES C. OTIS
Associate Justice

(Title of Cause—Office of Clerk of Supreme Court.)

(Petition for Reargument Filed)

September 27, 1974

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

Application for reargument having been filed herein all further proceedings, except taxation of costs are stayed pending its determination.

Yours respectfully,

JOHN McCARTHY
Clerk Supreme Court

A petition for reargument does not stay taxation of costs and disbursements.

(Title of Cause—Office of Clerk of Supreme Court.)

(Petition Denied)

October 2, 1974

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petitions for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

JOHN McCARTHY
Clerk Supreme Court

RULE 102. SUSPENSION OF RULES

In the interest of expediting decision upon any matter before it, or for other good cause shown, the Supreme Court, except as otherwise provided in Rule 126.02, may suspend the requirement or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.

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